



BRIEF IN SUPPORT OF PETITION

I.

OPINIONS BELOW

The opinion of the District Court has not been officially reported, but is printed in full in the record (R. 66).

The opinion of the Circuit Court of Appeals has not been officially reported, but is printed in full in the record (R. 180).

II.

JURISDICTION

The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code as amended by Act of February 13, 1925 (28 U. S. C. Sec. 347A). The date of the decree of the Circuit Court of Appeals for the Sixth Circuit (R. 180) sought to be reviewed was May 11, 1940. The date of the order of said Circuit Court of Appeals denying the petition for rehearing was June 27, 1940 (R. 191).

III.

STATEMENT OF THE FACTS

The facts have been fully set forth under the caption "Statement of Matters Involved" which is hereby adopted.

IV.

SPECIFICATION OF ERRORS TO BE CHARGED

The Circuit Court of Appeals erred:—

1. In holding that the oral understanding created a lien superior to the trustee's title and lien.
2. In deciding the case on the April understanding instead of the December understanding and immaterial facts not within the issue.
3. In holding that an assignment of accounts receivable arose out of the oral understanding of December, 1936.
4. In affirming the decree of the District Court.

V.

SUMMARY OF ARGUMENT

1. The rights of the parties under the oral understanding of December, 1936, are to be determined by the laws of Michigan. Under the law of Michigan equitable assignments or liens will not be created by courts to aid a litigant. Under the law of Michigan the rights of third parties cannot be adversely affected by the creation of an equitable assignment or lien.
2. The oral understanding of December, 1936, provided for a conditional sale, void under the laws of Michigan, because not in writing and filed as a chattel mortgage. It was void as against the trustee's statutory lien. Appellee could not have reclaimed any of the raw materials sold the bankrupt under this void contract. By what feat of *leger de main* can appellee obtain proceeds of sale of this raw material from the *bank* account of the bankrupt when

it could not reclaim the merchandise itself? The written assignment of June 26th has no connection whatsoever with the oral understanding of December, 1936, and the written assignment of June was not in confirmation thereof but a new contract created within the four months period and void for that reason.

3. Under the pleadings in this case appellee is confined to the oral agreement of December, 1936, and if an equitable lien arose that is good against the trustee in bankruptcy it must have arisen out of the bankrupt's undertaking to instruct its customer to pay proceeds of sales to appellee, which amounted to nothing more than an agreement to direct the payment of money out of a particular fund which, under the weight of authority, is insufficient to create an assignment *in praesenti*. The fact that the bankrupt disregarded this understanding and collected substantial sums monthly of its accounts from its customer proves conclusively that the bankrupt did not part with title in the accounts in December.

VI.

ARGUMENT

**The Court Below Has Decided Important Questions of
Local Law in Conflict With the Decisions of the
Supreme Court of Michigan**

The rights of the parties under the oral understanding of December, 1936, are to be determined by the law of Michigan.

Lone Star Cement Corporation v. Swartwout, 93
Fed. 2nd (C. C. A. 4) 767, 770.

Under Michigan law equitable liens or assignments can not be created by courts to aid a litigant.

Frost v. Atwood, 73 Mich. 67, 73.

Dehn v. Dehn, 170 Mich. 407, 13.

Adrianse v. Rutherford (Cooley, J.), 57 Mich.
170, 4.

Kelly v. Kelly, 54 Mich. 30, 47.

Richards v. Shingle Co., 74 Mich. 57, 62.

Scott v. Freeman, 227 Mich. 541, 3.

Fredericks Lumber Co. v. Evans, 266 Mich. 486.

Cheff v. Haan, 269 Mich. 593, 8.

Whitehead v. Barker, 288 Mich. 19, 27.

Under the law of Michigan rights of third parties cannot be adversely affected by the creation of an equitable assignment or lien.

Morse v. Allen Estate, 99 Mich. 303, 306.

Grand Rapids Trust Co. v. Reliable Coal and Mining Co., 238 Mich. 248.

An equitable assignment or lien cannot arise out of a void conditional sale contract against a trustee in bank-

ruptcy. Under such a contract the merchandise sold cannot be reclaimed, much less the proceeds of sale.

Frigidaire Sales Corporation v. Pospeshil, 257 Mich. 688.

In all the cases relied upon by the lower court there were *written contracts* that *provided for* an assignment of accounts and no question was raised as to the existence of the contracts but as to their effect.

Greey v. Dockendorf, 231 U. S. 513, 34 S. Ct. 166; 58 L. Ed. 339, was decided before the 1910 amendment to the Bankruptcy Act, Sec. 47 a (2) giving a trustee in bankruptcy the highest type of lien known to the law, went into effect.

In *Union Trust Co. v. Bulkley*, 150 Fed. 510, all parties conceded that a present assignment of accounts was effected.

In *In re United Fuel & Supply Co.*, 250 Mich. 325, the court points out that the effect of the arrangement was to *create a preference*. As the case arose under state law and not in bankruptcy the preference was valid. Attention is called to the dissenting opinion in this case. The case holds that the right of the assignor to collect the accounts and remit to the assignee from time to time did not defeat the *transfer of title* effected under the prior *written contract*.

Under the December oral understanding, in the case under consideration, the claimed assignor (bankrupt) was not given the right to collect the accounts from the Products Company, pursuant to an arrangement to remit the money to the assignee (appellee). Appellee contends that the oral December understanding, involving no more than an undertaking by the bankrupt to *instruct* the Products Company to remit moneys to the assignee, not lived up to, constituted a *then present assignment* and a *transfer of title* in and to the accounts. The lower courts sustained this contention.

An undertaking to direct the payment of money out of a particular fund does not constitute an assignment of accounts.

In re Stiger, 209 Fed. 148 (C. C. A. 3), aff'g 202 Fed. 791.

B. Kuppenheimer v. Mornin (C. C. A. 8), 78 Fed. 2nd 261, 5; 101 A. L. R. 75.

Lone Star Cement Corporation v. Swartwout (C. C. A. 4), 93 Fed. 2nd 767, 771.

**The Decision of the Court Below in This Case Is In
Conflict With the Decisions of Other Circuit
Courts of Appeal on the Same Matters**

Lone Star Cement Corporation v. Swartwout (C. C. A. 4), 93 Fed. 2nd 767, 770.

In re Stiger (C. C. A. 3), 202 Fed. 791, aff'g 209 Fed. 148.

In re Friedman (C. C. A. 2), 72 Fed. (2nd) 412.

B. Kuppenheimer v. Mornin (C. C. A. 8), 78 Fed. (2nd) 261.

Scott County Milling Co. v. Grayson (C. C. A. 5), 88 Fed. (2nd) 190.

Reliance Shoe Co. v. Manly (C. C. A. 4), 25 Fed. (2nd) 381.

Ramsey-Milburn Co. v. Eaves (C. C. A. 8), 283 Fed. 776.

**The Court Below Has Decided An Important Question of
General Law in a Way Probably Untenable or in
Conflict With the Weight of Authority**

1. An undertaking to instruct the Products Company to remit moneys to appellee is nothing more than an undertaking to direct payment out of a specific fund and does not constitute an assignment of accounts, giving the claimed assignee an equitable lien superior to the trustee's title and statutory lien.

Christmas v. Russell, 14 Wall. 69, 71; 29 Law Ed. 762.

Walker v. Brown, 165 U. S. 654, 17 S. C. 453; 41 Law Ed. 865.

Barnes v. Alexander, 232 U. S. 117, 34 S. C. 276; 58 Law Ed. 530.

Lone Star Cement Corporation v. Swartwout, 93 Fed. 2nd (C. C. A. 4) 767, 770.

B. Kuppenheimer v. Mornin (C. C. A. 8), 78 Fed. 2nd 261, 101 A. L. R. 75 and note.

In re Stiger (C. C. A. 3), 202 Fed. 791, aff'g 209 Fed. 148.

2. The oral conditional sales contract of December, 1936, being void under the laws of Michigan, appellee could not recover the merchandise itself from the trustee, much less the proceeds thereof from the bankrupt's bank account before the filing of the petition in bankruptcy, and the proceeds of bankrupt's accounts receivable after the filing of the petition in bankruptcy.

In re Mutual Motors Company, 260 Fed. 341.

Frigidaire Sales Corp. v. Pospeshil, 257 Mich. 688.

Scott County Milling Co. v. Eggleston (C. C. A. 5), 45 Fed. (2nd) 502.

Reliance Shoe Co. v. Manly (C. C. A. 4), 25 F. (2nd) 381.

In re United States Electrical Supply Co., 2 Fed.
(2nd) 378.
Ramsey-Milburn Co. v. Eaves (C. C. A. 8), 283
Fed. 776.

CONCLUSION

The question involved in this case is not whether a valid oral assignment of accounts can be made under the laws of Michigan, but whether under the December oral understanding claimed, a then present assignment, passing title, was effected, that would justify appellee in obtaining the moneys that it did, within the four months' period, from the bankrupt's bank account and out of the bankrupt's accounts receivable, after the filing of the petition in bankruptcy.

The lower court, through a desire to render what it considered equitable justice to appellee, because it had furnished the essential raw material required for the bankrupt to operate, created an equitable lien in a case where an equitable assignment was asserted, overlooking that other creditors, who had likewise furnished just as necessary raw materials, but in smaller amounts, with equal equities, were adversely affected to the extent of approximately \$20,000.

The court overlooked that the oral contract, relied on by appellee, arose out of the December understanding, and instead of confining the issue to that understanding, the court found that an equitable lien arose, without specifying how or when it was created. By so doing the court defeated the trustee's title in the money and accounts and the superior specific and prior lien granted to the trustee under the 1910 amendment to the Bankruptcy Act, being Section 47a(2); 11 U. S. C. A. Sec. 75(a)2.

Respectfully submitted,

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